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July 23, 2012

TO: SUPERVISOR ZEV YAROSLAVSKY, Chairman
SUPERVISOR GLORIA MOLINA
SUPERVISOR MARK RIDLEY-THOMAS
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FROM: JOHN F. KRATTLI 
County Counsel

RE: **Item No. 15 for the Agenda of July 24, 2012**
AIDS Healthcare Foundation Ballot Initiative – Safer Sex in
the Adult Film Industry

Purpose of Memorandum

This memorandum responds to questions raised by your Board concerning the "County of Los Angeles Safer Sex in the Adult Film Industry" ballot initiative sponsored by the AIDS Healthcare Foundation. The Department of Public Health will also be providing a memorandum to your Board in response to your questions.

Summary

On July 3, 2012, the County Registrar-Recorder/County Clerk ("RRCC") certified the Safer Sex in the Adult Film Industry Initiative ("Initiative"). On July 10, 2012, the matter was before your Board for certification of the results of the Registrar-Recorder's determination that sufficient valid signatures had been obtained, Countywide, to qualify the measure for placement on the ballot. At that time we advised that your Board was required to either adopt the ordinance contained in the Initiative without alteration, **or** submit the Initiative, without alteration, to the voters on the next Statewide ballot, **or** request a report on issues related to the Initiative before taking one of the two previously identified actions at a subsequent Board meeting. You asked that our office and the Department of Public Health ("DPH") report back on various issues related to the Initiative, and you continued the matter to your July 24, 2012, meeting.

Both the California Elections Code and case law support the conclusion that all qualified voters in the County, whether residing in incorporated or unincorporated areas, are entitled to vote on the Initiative.

If approved, all of the ordinance provisions of the Initiative would become part of the County Code and would be effective in the unincorporated areas of the County.

However, in light of the language of the agreements pursuant to which DPH provides services to 85 of the 88 cities in the County, the "public health permit" provisions set forth in the Initiative would not become effective within any of those cities until such city has adopted those measures into its municipal code. Once adopted by one of those cities, DPH would then enforce the adopted ordinance within the jurisdiction of that city.

Likewise, the zoning "film permit" provisions of the Initiative would not become effective in any city, unless and until the city took an affirmative action to adopt such provisions as part of its municipal code.

The Initiative's provisions will not be enforceable by DPH in the cities of Vernon, Long Beach, and Pasadena. Those cities do not contract with DPH and have their own health officer. Those city health officers enforce both State health laws and their own municipal health codes, but do not enforce County health laws. Accordingly, those cities would have to enact a similar adult film industry condom requirement ordinance and enforce it themselves.

The following analysis also discusses the initiative process, potential legal challenges to the Initiative, the fact that the County is not obligated to defend the validity of the Initiative, potential liability of the County if the Initiative is approved, DPH's enforcement of the Initiative provisions, and comparisons with the City of Los Angeles and the Simi Valley ordinances.

ANALYSIS

The Initiative Process

The initiative process established by the Legislature, and described in the Elections Code, contemplates that County initiatives be approved by voters countywide. The statutory scheme includes circulation of petitions in the signature gathering stage throughout the County, as well as a vote by all electors of the County once the ordinance is submitted to the voters.

Proponents of an initiative must file a notice of intention with the County elections official prior to circulating a petition for signatures in a county (Elections Code § 9103(a)). A copy of the proposed measure is transmitted by the County elections official to the County Counsel to complete an impartial title and

summary, which shall be finalized within 15 days (Elections Code § 9105). The County Counsel's title and summary must appear on each section of the petition and across the top of each page of the petition (Elections Code § 9105 (c)). Any elector of the County, whether a resident of the unincorporated area or an incorporated city, may seek a writ of mandate to have the ballot title or summary amended (Elections Code § 9106).

The number of signatures required for an initiative to qualify for a ballot is determined by the Registrar prior to circulating the petition. That number is ascertained based on the total number of votes cast in the County for all candidates for Governor at the last gubernatorial election (Elections Code § 9107). Petitions are circulated countywide after the proponents have published the County Counsel's title and summary (Elections Code § 9108).

The Elections Code does not provide for a manner in which to calculate the signatures required for an unincorporated area only vote, nor does it provide for signature gathering in only the unincorporated area.

Once a petition is certified as sufficient by the Registrar, and placed on the ballot by the Board of Supervisors, if the ballot measure receives a majority vote in its favor, the ordinance shall become a valid and binding ordinance of the County. The ordinance shall go into effect 10 days after the date the final results of the election are declared by the Board of Supervisors.

Here, the proponents of the "County of Los Angeles Safer Sex in the Adult Film Industry Act" filed a Notice of Intention to Circulate Petition with the Registrar on November 23, 2011. On December 7, 2011, the County Counsel prepared the title and summary of the initiative (enclosed) in conformance with Elections Code section 9105. The title and summary were provided to the proponents and were included in the petitions.

The County Counsel has a ministerial duty to provide the title and summary when requested by an initiative proponent, unless an action is filed seeking authorization from the court to be relieved of that duty. *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769, 779. A court will only relieve the County Counsel from the duty if the initiative is clearly unconstitutional. *Id.* at 780.

The Initiative is Subject to a Countywide Vote

The One-Person, One-Vote Rule

In addition to the statutory scheme established by the Legislature providing for countywide votes on initiatives described above, the one-person, one-vote rule strongly suggests that when general funds available for countywide

services are at issue, or when there is a public interest in the matter affecting all citizens of the County, no one segment of the voting jurisdiction is entitled to more input in an election, and all voters in the County must have the opportunity to vote.

The Constitution protects the right of all qualified citizens to vote in federal, state and local elections. *Reynolds v. Sims* (1964) 377 U.S. 533, 554, and *Avery v. Midland County* (1968) 390 U.S. 474. If the government body in question has substantial "general government powers," it is subject to a strict scrutiny analysis and the one-person, one-vote principle must be adhered to throughout the geographic region under the jurisdiction of the governing body. *Id.* at 485-486.

The U.S. Supreme Court and California Courts have found that when a public entity exercises general powers of government, the right to vote cannot be restricted to certain groups. "When all citizens are affected in important ways by a governmental decision . . . , the Constitution does not permit . . . the exclusion of otherwise qualified citizens from the franchise." *Phoenix v. Kolodziejski* (1970) 399 U.S. 204.

A California Court of Appeal struck down a voting scheme that excluded all unincorporated county voters from voting to approve the location of a county airport within a city. *Hawn v. County of Ventura* (1977) 73 Cal.App.3d 1009. The Court found the voting scheme unconstitutional because it denied the right to vote to all county residents. The court found that by restricting the right to vote to city voters, those voters were not only given the power to prohibit airports within their borders, but also the power to dump the problem upon the disenfranchised residents of the unincorporated areas. *Id.* at 1020.

The Initiative creates a County ordinance and explicitly gives your Board the power to amend the ordinance. The Initiative proposes additional duties for the Public Health Officer who is appointed by and serves under the direction of your Board. Because the Initiative impacts the revenues collected and the services provided by DPH, and can implicate general funds, the benefits and burdens may affect all County residents with an interest in County services.

The residents of incorporated cities have a substantial interest in measures regulating public health. As more fully explained below, the Initiative, if approved by the voters, would be effective in the unincorporated areas and in those cities which contract for DPH services and which adopt the necessary ordinances. City residents are entitled to vote on the Initiative and thereby affect whether the Initiative's provisions may become effective in their city. If only unincorporated residents are allowed to vote and they reject the Initiative, city residents who support the Initiative would be denied the opportunity to have their city council take the necessary steps to make the Initiative's provisions effective

in their city. Conversely, city residents who oppose the Initiative would not be able to vote against the measure.

Based on the relevant case law, as well as the Elections Code provisions which clearly contemplate countywide signature gathering, we conclude that the voters throughout the County are entitled to vote on the Initiative.

Areas in the County in which the Initiative, if Approved by the Voters, would be Applicable

If approved by the voters, the Initiative will amend Title 11, Health and Safety, and Title 22, Planning and Zoning, of the Los Angeles County Code ("LACC"). The amendments to Title 11 would establish a "Public Health Permit," which would be valid for two years. The amendments to Title 22 would add new provisions and requirements to the existing County zoning provisions for an "on-location film permit". Both the public health permit provisions and the on-location film permit provisions would be operable in the unincorporated areas of the County.

Public Health Provisions. The Title 11 Public Health Permit provisions would not be operable in incorporated areas of the County until those cities which contract with DPH for public health services adopt those provisions into their individual municipal codes. The reason for this is that the specific language of the contracts that DPH has with 85 cities to act as their local health officer requires a city's adoption of County health ordinances (Title 11 or amendments thereto) prior to enforcement by DPH within that city.

The Initiative's provisions will not be operable in the cities of Vernon, Long Beach, and Pasadena. Those cities, which have their own health officers, do not contract with DPH for public health services. Those cities' health officers enforce both State health laws and their own municipal health codes, but do not enforce County health laws. Those cities would have to enact their own adult film industry regulations and enforce those regulations themselves.

On-location Film Permit Provisions. The portion of the ordinance that amends Title 22, Planning and Zoning, of the County Code will be operable in the unincorporated areas. The 85 DPH contracted cities would have to adopt these provisions into their municipal codes for the adult film permit provisions to apply to filming permits issued by those cities.

It is important to note, that in any city that adopts the Title 11 Public Health Permit provisions of the Initiative, DPH would have public health permit inspection duties over adult movie filming even if that city chose not to adopt the on-location filming permit provisions of the Initiative. The on-location

filming permit provisions would enhance DPH's regulation of adult movie filming in the cities by providing additional notice to DPH of specific film shoots, as well as providing additional permit fees to finance DPH's regulations under the Initiative. However, additional benefits would only accrue in those cities if adult film producers agree to obtain on-location film permits.

Potential Legal Challenges to the Proposed Ordinance

Challenges Based on the Initiative Power

Generally, the initiative power applies only to acts that are legislative in character, not to executive or administrative acts. *Simpson v. Hite* (1950) 36 Cal.2d 125, 134. A ballot measure may be challenged prior to an election where it is determined that the electorate does not have the power to adopt the proposal in the first instance. *AFL v. Eu* (1984) 36 Cal.3d 687, 695. For example, a measure may be excluded from the ballot if it violates the single subject rule, or if the measure is not properly the subject to the initiative power. *Id.* at 695-696.

In this instance, the Initiative, which would create a new regulatory scheme, plainly appears legislative in nature. A legal challenge asserting that the Initiative is not a proper subject of the initiative power, would be unlikely to succeed.

Constitutional Challenges

In terms of the substantive provisions of the Initiative, it is unclear whether the measure violates the First Amendment and other constitutional protections. Some cases suggest that even if a proposed measure is within the initiative power, courts have the discretion to allow a pre-election challenge upon a compelling showing that the substantive provisions of the initiative are clearly invalid. However, making such a showing is difficult, requiring a clear showing of a facial defect.

With respect to the possibility of legal challenges regarding the Initiative, constitutional legal challenges may come from the Free Speech Coalition, as well as individual producers and performers. There are two types of possible challenges: (1) A facial challenge to the constitutionality of the ordinance as written, and (2) an "as applied" challenge to the ordinance as it is actually enforced. These challenges may be brought separately or be combined in a single or multiple lawsuits. A challenge solely to the constitutionality of the ordinance need not be defended by the County. However, the County would need to defend itself and its employees in an as-applied challenge to the constitutionality of any County enforcement actions, since this would be based on actions taken by the County in implementing the ordinance.

Duty to Defend

If the measure is challenged prior to or after placement on the ballot, the County is under no obligation to defend the validity of the measure. For example, in *Perry v. Brown* (2011) 52 Cal.4th 1116, the California Supreme Court held that the proponent of an initiative was uniquely positioned to defend the validity of an initiative where the public official has declined to do so. The Court recognized that "although public officials ordinarily have the responsibility of defending a challenged law, in instances in which the challenged law has been adopted through the initiative process there is a realistic risk that the public officials may not defend the approved initiative measure 'with vigor.' [Citations omitted]. This enhanced risk is attributable to the unique nature and purpose of the initiative power, which gives the people the right to adopt into law measures that their elected officials have not adopted and may often oppose." *Id.* at 1149. During the lawsuit challenging Proposition 8, the County took no position on the merits of the measure after passage by the voters, and no attorney fees were awarded against the County.

Potential Liability of County if the Initiative is Approved by the Voters

The ordinance requires the County to issue adult film public health permits to qualifying adult film producers prior to the filming of an adult film. The stated purpose of the Initiative is to minimize the spread of sexually transmitted infection during the filming of adult films.

It should be noted that, in 2009, AIDS Healthcare Foundation ("AHF") filed a lawsuit against the County, seeking a writ of mandate to compel the County to require the use of condoms in the making of adult films. Should the Initiative pass, it is possible that AHF may seek to impose certain regulatory requirements regarding the enforcement of the ordinance through a writ of mandamus.

Although the ordinance requires DPH to create a regulatory permitting process, it leaves specific enforcement procedures and actions to the discretion of DPH. As such, it is unlikely that discretionary enforcement under the ordinance would create a mandatory duty to protect a particular performer or performers from injury. There are a variety of immunities that would be applicable to the County and Public Health Officer for actions taken in implementing and enforcing the Initiative's provisions. These include Government Code section 818.2 (immunity for failure to enforce any law); Government Code section 818.4 (immunity for issuance or denial of a permit or license); and Government Code section 818.6 (immunity for failure to inspect). Moreover, Government Code section 855.4 immunizes a public entity and public employee from an injury resulting from a decision to perform or not perform a discretionary act to control the spread of communicable disease.

Enforcement of the Initiative by DPH

Once the ordinance is adopted, DPH is charged with enforcing the public health provisions. As previously stated, DPH also enforces the public health ordinances of those cities which have entered into contracts with the County for enforcement. Accordingly, DPH would also be responsible for enforcing the County ordinance in those contract cities which adopt the ordinance. The County ordinance contemplates that DPH may promulgate regulations pertaining to the filming of adult films.

The Initiative requires that producers of adult films must have an adult film public health permit in order to film or produce adult films. It is a violation of the ordinance for a producer to fail to require performers to use condoms or other safety precautions during acts of sexual intercourse. Should producers not comply with the requirements of the adult film public health permit, the permit can be suspended or revoked depending on the violation.

DPH must initiate an enforcement scheme that provides for the citation of adult film producers that violate the ordinance. The specific procedures of the enforcement scheme would need to be determined by DPH.

For those adult film producers who have obtained an adult film public health permit from DPH, the Initiative contemplates inspections by DPH investigators. During the inspections, DPH investigators are to determine whether or not the adult film producer is in compliance with the conditions of the permit. If not in compliance, the DPH investigator is to provide a statement of deficiencies and a list of corrective measures necessary to return to compliance with the permit requirements to the producer. In order to accomplish inspections, the Initiative permits DPH investigators "to enter and inspect any location suspected of conducting any activity regulated" by the County's Initiative. DPH inspectors may then "take possession of any sample, photograph, record or other evidence, including documents bearing upon an adult film producer's compliance." Further, the Initiative allows for reinspection of premises by DPH after a notice of deficiencies has been issued to a producer.

For those adult film producers who are filming without a valid public health permit, the Initiative permits the entry of premises that DPH investigators suspect are filming adult content without a permit.

The County is not Required to Set Up its Own Film Permitting Office

The question has arisen whether passage of the Initiative would require the County to set up its own film permitting office. Although we believe the County would be responsible for ensuring that an on-location film permitting process was in place and that film permits issued for adult filming activity

contained the content required in the Initiative, we do not believe that the County would be required to establish any specific model for film permitting or create a new film permitting office.

The Initiative would amend section 22.56.1925 of Title 22 (Planning and Zoning) of the County Code. That section sets forth the current requirements relating to the issuance of on-location filming permits, a type of temporary use permit. The Initiative amends the existing on-location filming permit provisions to impose specific requirements for permits issued to the producers of adult films. On-location filming permits for adult films must contain language requiring the permittee to abide by all applicable health and safety regulations, including mandating the use of condoms, to shield performers from exposure to blood borne and other sexually transmitted infections. Any person obtaining an adult film on-location filming permit would be required to maintain engineering and work practice controls in order to protect employees from exposure to sexually transmitted infections. The County would be required to charge a permit fee for such on-location filming permits that was sufficient to provide for periodic inspections to ensure compliance with the public health requirements imposed by the Initiative.

Currently, the issuance of on-location filming permits in the County is coordinated through Film LA. Should the Initiative pass, we believe that such coordination could continue, but the County would have to take steps to ensure that the permits issued for adult film on-location filming in the unincorporated County by Film LA meet the additional requirements established by the Initiative as described in the previous paragraph. We do not believe that the initiative language relating to on-location filming permits dictates the creation of any specific type of film-permitting office. In fact, the language of the Initiative relating to on-location film permits specifically provides that the provisions apply directly to the County, or to any entity contracting with the County to administer the involved film permitting process.

As indicated elsewhere in this memorandum, in the event the Initiative is approved by the voters, the provisions of the Initiative addressing on-location film permits would only be automatically effective in the unincorporated areas of the County, since the on-location filming permit provisions of the County Code only apply to unincorporated County areas. Any city electing to have those provisions apply within its boundaries would be required to adopt an ordinance imposing those requirements within its own municipal code. Such a city would then have to take steps to ensure that on-location filming permits for adult films complied with the provisions of the Initiative. The specific approach used by any such city for the issuance of on-location filming permits for adult films would have to be determined by that city.

Differences between the City Ordinance and the Proposed County Ordinance

The City ordinance is significantly less extensive in scope than the County ordinance proposed by the Initiative. The proposed County ordinance regulates all adult film production, while the City ordinance only regulates persons or entities who obtain film permits from the City for on-location commercial filming of adult films.

The City ordinance requires that all producers of adult films issued permits under the authority of the City are required to maintain engineering and work practice controls to protect employees from exposure to blood and other potentially infectious materials. Such controls include, but are not limited to, simulation of sex acts, use of condoms, and the provision of lubricants to facilitate condom use. Any City adult film permit must include language requiring the permittee to abide by all applicable workplace health and safety regulations, including the provisions of the California Code of Regulations which require the use of barrier protection, including condoms, during film production.

The City ordinance does not, as does the proposed County ordinance, 1) require the producers of adult films to obtain a public health permit; 2) require the successful completion of a blood pathogen training course by all permittees; 3) provide for the City to promulgate regulations for an exposure control plan, and to review and approve such plans; 4) provide that the City may enter and inspect any location for the purposes of enforcing the ordinance; 5) provide a process for the suspension and revocation of the City permit; 6) provide for both civil fines and misdemeanor penalties, and injunctive relief; or 7) provide that if the City permit is suspended or revoked, the involved producer of the adult films shall cease filming adult films

The City of Simi Valley Has Adopted An Ordinance Similar to the City of Los Angeles Ordinance

In April 2012, the City of Simi Valley adopted an ordinance similar to one adopted by the City of Los Angeles. Simi Valley now requires producers to obtain an adult film permit. The Simi Valley Ordinance requires condoms, dental dams or other appropriate means to be used in every instance of sexual penetration or oral sex in the production of an adult film within the city. The ordinance permits the city's director of administrative services to review all film or other media evidencing sexual penetration or oral sex and inspect any site where the production of an adult film takes place.

If you have questions concerning this matter, please contact me, Assistant County Counsel Richard K. Mason at (213) 974-1866, or Principal Deputy County Counsel Robert E. Ragland at (213) 974-1928.

JFK:RER:sc

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